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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| NORCAL MUTUAL INSURANCE COMPANY,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>SEDGWICK, DETERT, MORAN & ARNOLD,<br><br>Defendant and Respondent. | B203357<br><br>(Los Angeles County Super. Ct. No. BC371822) |

APPEAL from a judgment of the Superior Court for Los Angeles County, Malcolm H. Mackey, Judge. Affirmed.

White and Williams and Thomas A. Allen; Cole Pedroza, Matthew S. Levinson and Kenneth R. Pedroza for Plaintiff and Appellant.

Munger, Tolles & Olson, Bart H. Williams, Jonathan E. Altman and Bethany Woodard for Defendant and Respondent.

Plaintiff NORCAL Mutual Insurance Company (NORCAL) sued the law firm of Sedgwick, Detert, Moran & Arnold (Sedgwick) for legal malpractice and breach

of fiduciary duty. The trial court sustained Sedgwick's demurrer without leave to amend, and entered a judgment of dismissal, on the ground that Code of Civil Procedure[1] section 340.6, the statute of limitation for claims arising from an attorney's wrongful act or omission, bars NORCAL's claims. NORCAL appeals, contending that the trial court erred because: (1) NORCAL did not sustain "actual injury," and therefore the statute of limitation did not begin to run, until less than a year before its complaint was deemed filed; (2) the statute was tolled because Sedgwick continued to represent NORCAL; and (3) section 340.6 does not apply to NORCAL's claim for breach of fiduciary duty, which has a four-year statute of limitation. NORCAL also contends the trial court erred by denying it leave to amend its complaint. We affirm the judgment of dismissal.

## BACKGROUND[2]

*NORCAL's Health Care Professional Liability Insurance Program*

Along with certain reinsurers, NORCAL created a Managed Health Care Professional Liability Insurance program. In that program, NORCAL issued managed healthcare professional liability policies to its insureds, and the reinsurers reinsured NORCAL for 100 percent of the amounts NORCAL incurred with respect to each policy.[3] One of NORCAL's insureds under this program was Gallatin Medical

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[1] Further undesignated statutory references are to the Code of Civil Procedure.

[2] Because this case comes to us upon the sustaining of a demurrer, we set forth the facts as alleged in the complaint.

[3] There were several reinsurers who took part in this program, including Certain Underwriters at Lloyd's of London (Lloyd's), CNA Reinsurance Company Ltd., and Terra Nova Insurance Company, Ltd. Apparently, not all of the reinsurers provided reinsurance for each policy issued under the program. In fact, with regard to the two

Foundation (GMF).[4] This case involves Sedgwick's legal representation of NORCAL with regard to coverage of a claim tendered to NORCAL by GMF.

NORCAL's insurance program worked as follows. When a prospective insured applied for a policy, the insured's application would be submitted to Medical Risk Management Insurance Services (MRMI), a joint venture owned in part by NORCAL and operated at the behest of the reinsurers in the underwriting and policy issuance process. The application would be forwarded through certain entities to the reinsurers, who would underwrite the policy. MRMI would be advised of the reinsurers' terms for the prospective policy, and would inform the insured (or the insured's broker) of the proposed terms. If the insured agreed to those terms, MRMI would issue the policy on NORCAL paper, and a reinsurance contract would be created to cover NORCAL for the same risk covered by the policy. The reinsurance would be evidenced by a "cover note" reflecting the coverage. NORCAL did not take an active role in underwriting under the program; all underwriting decisions were made by the reinsurers.

*The 1999/2000 Policy and Renewal Negotiations*

In this case, MRMI issued a policy on NORCAL paper to GMF for the period August 27, 1999 to August 27, 2000 (the 1999/2000 policy), and the reinsurers (see fn. 3, *ante*) reinsured that policy on the same terms.

In July 2000, GMF began the process for renewing the 1999/2000 policy. Negotiations, however, were delayed for various reasons. The period for the

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policies discussed in the complaint, Lloyd's provided reinsurance as to both, but the others provided reinsurance as to only one, i.e., the 1999/2000 policy described below.

[4] Gallatin Medical Foundation changed its name in 2001 to Presbyterian Health Physicians. Nevertheless, we will refer to it as GMF throughout this opinion.

policy was extended to November 17, 2000, but negotiations continued beyond this date. Among the terms being negotiated was an increased policy deductible and an increased policy premium.

In January 2001, the reinsurers advised MRMI of the proposed terms of the renewed policy, which would take effect retroactively on November 18, 2000 (the day after expiration of the extended policy period for the 1999/2000 policy). The terms for the renewed policy included a requirement that the insured, GMF, provide a signed declaration that no claims had arisen during the delayed renewal period.

In February 2001, GMF's president wrote a letter informing MRMI about pending litigation that was filed by Gallatin Medical Corporation (GMC) against GMF in January 2001 (the GMC/GMF action). On February 16, 2001, GMF's broker was given the revised terms for the proposed renewed policy. Those terms included a coverage exclusion for "any loss from the pending litigation between GMF and GMC and any other instances that are known or have been reported at confirmed acceptance to these terms."

That same day (February 16, 2001), GMF's broker instructed MRMI to bind the policy in accordance with the revised terms. MRMI bound the renewed policy, which was for the period November 18, 2000 to November 18, 2001 (the 2000/2001 policy).

*GMF's Tenders and NORCAL's Denial of Coverage*

Four days later, on February 20, 2001, GMF's broker tendered the GMC/GMF action to NORCAL and other insurers. At that time, NORCAL had no knowledge that MRMI had bound the 2000/2001 policy subject to an exclusion of the GMC/GMF action. NORCAL lost and/or misfiled the tender letter, and no action was taken.

In March 2001, MRMI received the "cover note" issued by the reinsurers evidencing the reinsurance for the 2000/2001 policy. The cover note identified a "condition" that the reinsurance policy would not apply "to any known or reported losses prior to 27th February 2001."

On April 5, 2001, MRMI issued the 2000/2001 policy on NORCAL paper. The policy as issued did not include an exclusion of the GMC/GMF action or any other known or reported loss during the delayed renewal period.

In February 2002, GMF, through its defense counsel in the GMC/GMF action, re-tendered the GMC/GMF action to NORCAL. Although NORCAL's usual practice was to tender claims under managed healthcare professional liability policies to the reinsurers for handling, the NORCAL claims handler handled the claim herself. Unaware of the prior tender in February 2001, which was within the reporting period for the 2000/2001 policy, she denied the claim under that policy as having been made outside the reporting period.

*Sedgwick Advises NORCAL*

In October 2002, GMF's insurance coverage attorney sent a letter to NORCAL's coverage counsel with evidence showing that GMF had tendered the claim in February 2001, which would make the tender timely under the 2000/2001 policy. NORCAL then tendered the GMC/GMF action to the reinsurers for handling under the 2000/2001 reinsurance contract.

At the direction of the reinsurers, Sedgwick assumed responsibility for advising NORCAL and the reinsurers regarding GMF's claim. Therefore, "NORCAL entered an attorney-client relationship, whereby [Sedgwick] would provide to NORCAL a legal opinion as to whether NORCAL should acknowledge a duty to defend and/or a duty to indemnify [GMF] under the 2000/2001 Policy for the [GMC/GMF action]."

NORCAL provided Sedgwick with a copy of its claim file for the GMC/GMF action, including the October 2002 letter from GMF's coverage attorney providing evidence of the February 2001 tender. Sedgwick recommended that NORCAL deny coverage under the 2000/2001 policy because the claim was not tendered until after the end of the policy's reporting period. Sedgwick's analysis did not address the February 2001 tender within the reporting period or the fact that the 2000/2001 policy had been bound subject to a "known loss" exclusion. Thus, Sedgwick did not advise NORCAL that it should change its position on the timeliness of the tender and acknowledge a duty to defend, nor did it advise NORCAL of the steps that should be taken to raise and perfect the coverage defense based upon the "known loss" exclusion.

*In June 2004 GMF Sues NORCAL in the InterHealth Action*

The GMC/GMF action settled in 2003. In November 2003, GMF, InterHealth Corporation (the parent company of GMF) and various other plaintiffs sued several insurers -- but not NORCAL -- for breach of contract and bad faith, among other claims (the InterHealth action).

NORCAL was added to the InterHealth action in June 2004, and GMF cross-complained against NORCAL for breach of contract and tortious bad faith based upon NORCAL's denial of coverage for the GMC/GMF action under the 2000/2001 policy due to late tender.[5]

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[5] Although it is not alleged in the complaint in this action, NORCAL states in its opening brief on appeal that NORCAL was brought into the InterHealth action when two of the defendant insurers cross-complained against it for indemnity. The opening brief also states that NORCAL then sued GMF for reformation and rescission, and GMF cross-complained against NORCAL for breach of contract and bad faith.

*In May 2005 Sedgwick Represents the Reinsurers in Denying Coverage to NORCAL*

NORCAL tendered the InterHealth action to the reinsurers under the 2000/2001 reinsurance contract. On May 31, 2005, the reinsurers -- represented by Sedgwick -- denied coverage based upon the known claim exclusion in the 2000/2001 reinsurance contract.

*NORCAL Settles the InterHealth Action*

In December 2005, GMF amended its cross-complaint against NORCAL in the InterHealth action to add a claim under the 1999/2000 policy, based upon its contention that the requirements of Insurance Code section 678.1 had not been met and therefore the 1999/2000 policy had remained in effect and provided coverage for the GMC/GMF action.[6] On December 16, 2005, NORCAL tendered the claim to the reinsurers under the 1999/2000 reinsurance contract. The reinsurers did not respond to NORCAL's tender.

NORCAL settled the InterHealth action in March 2006. In October 2006, the reinsurers responded to a letter from NORCAL regarding reinsurance under the 1999/2000 reinsurance contract. The reinsurers asked NORCAL questions about the GMC/GMF action and the settlement of the InterHealth action. NORCAL responded to the inquiries in November 2006. Sedgwick represented the reinsurers with respect to these communications.

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[6] Insurance Code section 678.1 requires that a non-renewal notice be sent to an insured at least 60 days before the expiration of a policy if the renewal is to be conditioned on a higher deductible or certain other conditions. If this requirement is not met, the statute provides that the original policy remains in force until 60 days after the requisite notice is given.

*The Sedgwick- NORCAL Tolling Agreement*

On December 8, 2006, Sedgwick and NORCAL entered into a tolling agreement, tolling any statute of limitation with respect to any claims NORCAL had against Sedgwick relating to GMF's coverage claims against NORCAL and NORCAL's reinsurance claims. The tolling agreement, which was in effect from December 8, 2006 through May 29, 2007, provided that any complaint filed within three court days after the expiration of the agreement would be deemed to have been filed as of December 8, 2006.

*NORCAL Sues Sedgwick for Malpractice and Breach of Fiduciary Duty*

In April 2007, the reinsurers advised NORCAL that it "appears unlikely" that the GMC/GMF action or the InterHealth action is reinsured under the 1999/2000 reinsurance contract. NORCAL filed this action against Sedgwick and the reinsurers on May 29, 2007, alleging two causes of action against Sedgwick, for legal malpractice and breach of fiduciary duty.

The legal malpractice cause of action alleges that NORCAL and Sedgwick entered into an attorney-client relationship, and that Sedgwick failed to exercise reasonable care and skill in advising NORCAL by (1) failing to properly advise NORCAL about the impact the evidence of a timely tender would have on NORCAL's denial of coverage based upon late tender and (2) failing to properly advise NORCAL regarding a coverage defense based upon the binding of the 2000/2001 policy subject to a known claim exclusion. NORCAL also alleges that Sedgwick violated its duty of loyalty by "concurrently and sequentially" representing conflicting interests in the same matter because Sedgwick represented both NORCAL and the reinsurers (who sought to avoid coverage under the reinsurance contracts), and that Sedgwick engaged in the unauthorized practice of law because the attorneys who advised NORCAL were not admitted to practice in California.

Finally, NORCAL alleges that, had Sedgwick exercised reasonable care in giving its advice regarding the 2000/2001 policy or notified NORCAL of its conflict of interest, NORCAL's liability to GMF would have been reduced and its liability for bad faith would have been eliminated.

NORCAL's breach of fiduciary duty cause of action alleges that Sedgwick breached its fiduciary duty owed to NORCAL by simultaneously representing NORCAL and the reinsurers regarding GMF's coverage claim without advising NORCAL of its conflict of interest, and by representing the reinsurers in their denial of NORCAL's claim under the 2000/2001 reinsurance contract. NORCAL alleges that, as a result of the alleged breach, NORCAL was exposed to bad faith liability, its claim was denied by the reinsurers, and it had to separately fund the settlement of the InterHealth action.

*Sedgwick's Demurrer*

Sedgwick filed a demurrer to the complaint on the ground that both causes of action are barred by the statute of limitation set forth in section 340.6. The trial court sustained the demurrer without leave to amend. The court found that NORCAL suffered actual injury from Sedgwick's alleged neglect when GMF sued NORCAL for bad faith breach of contract in June 2004, and that NORCAL was on notice of the alleged malpractice by May 31, 2005, when the reinsurers, represented by Sedgwick, denied NORCAL's claim arising from GMF's bad faith claim. Because the malpractice claim was not filed (or deemed filed) within one year of May 31, 2005, the court found the claim was barred under section 340.6. The court also found that the breach of fiduciary duty claim was barred by section 340.6 because it was based on the same factual allegations as the malpractice claim.

The court entered an order of dismissal, from which NORCAL timely appeals.

## DISCUSSION

A. *Standard of Review*

We review a dismissal following the sustaining of a demurrer without leave to amend de novo, treating the demurrer as admitting all material facts properly pleaded. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The party challenging the dismissal bears the burden of proving the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.)

B. *Section 340.6*

Section 340.6, subdivision (a) provides: "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: [¶] (1) The plaintiff has not sustained actual injury; [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred; [¶] (3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and [¶] (4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action."

The questions raised in the present case concern when NORCAL sustained actual injury, when Sedgwick ceased representing NORCAL, and whether the statute governs claims for fiduciary duty arising from Sedgwick's representation of allegedly conflicting interests.

C. *Actual Injury*

As we explain, the trial court correctly concluded that NORCAL sustained actual injury within the meaning of section 340.6 no later than June 2004, when GMF sued it for bad faith breach of contract in the InterHealth action.

In *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739 (*Jordache*), the Supreme Court observed there is no simple answer to the question: "When does a former client -- having discovered the facts of its attorneys' malpractice -- sustain actual injury so as to require commencement of an action against the attorneys within one year?" (*Id.* at p. 747.) As the Court explained, "[c]lients employ attorneys throughout the spectrum of personal and commercial affairs, and attorney errors do not always produce simple consequences. Nevertheless, understanding the function of the actual injury provision facilitates its consistent application to the specific factual circumstances of the particular case." (*Ibid.*)

The Court in *Jordache* noted that the actual injury tolling provision in section 340.6 derived from the Court's holding in *Budd v. Nixen* (1971) 6 Cal.3d 195 (*Budd*). (*Jordache, supra*, 18 Cal.4th at p. 748.) The Court explained: "*Budd*'s basic premise was that a plaintiff could not assert a cause of action for legal malpractice, and hence the limitations period should not commence, until the plaintiff sustained some damage occasioned by the attorney's negligence." (*Jordache, supra*, 18 Cal.4th at p. 749.) The Court quoted from *Budd* to illuminate: "'If the allegedly negligent conduct does not cause damage, it

generates no cause of action in tort. [Citation.] The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm -- not yet realized -- does not suffice to create a cause of action for negligence. [Citations.] Hence, until the client suffers appreciable harm as a consequence of [the] attorney's negligence, the client cannot establish a cause of action for malpractice.' [Citation.] 'The cause of action arises, however, before the client sustains all, or even the greater part, of the damages occasioned by [the] attorney's negligence. [Citations.] *Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue.*' [Citation.]" (*Jordache, supra*, 18 Cal.4th at pp. 749-750, quoting *Budd, supra*, 6 Cal.3d at pp. 200, 201.)

The Court pointed to cases subsequent to *Budd* that provide further understanding of the actual injury requirement: "Thus, *Davies v. Krasna* (1975) 14 Cal.3d 502, 514 held that the existence of appreciable actual injury does not depend on the plaintiff's ability to attribute a quantifiable sum of money to consequential damages. Similarly, *Laird* [*v. Blacker* (1992) 2 Cal.4th 606] rejected the claims that actual injury should be defined by a monetary amount and that the limitations period should be tolled if the injury is, in some way, remediable. [Citations.] *Adams* [*v. Paul* (1995) 11 Cal.4th 583] recognized that actual injury may consist of impairment or diminution, as well as the total loss or extinction, of a right or remedy." (*Jordache, supra*, 18 Cal.4th at p. 750.) The Court also quoted with approval the appellate court decision in *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217 (*Foxborough*): "'[W]hen malpractice results in the loss of a right, remedy, or interest, or in the imposition of a liability, there has been actual injury regardless of whether future events may affect the permanency of the injury or the amount of monetary damages eventually incurred.'" (*Jordache, supra,* 18 Cal.4th at p. 750, quoting *Foxborough, supra*, 26 Cal.App.4th at p. 227.) The Court

cautioned that courts "must distinguish between an actual, existing injury that might be *remedied or reduced* in the future, and a speculative or contingent injury that might or might not *arise* in the future." (*Jordache, supra*, 18 Cal.4th at p. 754.)

With these cases in mind, we examine the facts constituting the alleged malpractice in the instant case and the alleged consequences that resulted from the malpractice. (See *Jordache, supra*, 18 Cal.4th at p. 752 ["The determination of actual injury requires only a factual analysis of the claimed error and its consequences"].)

NORCAL alleges that Sedgwick gave negligent coverage advice and failed to notify NORCAL of its conflict of interest when giving that advice, and that as a consequence, NORCAL was subjected to a bad faith claim and increased liability to GMF. NORCAL was subjected to that bad faith claim and increased liability in June 2004, when GMF filed its cross-complaint in the InterHealth action. However, NORCAL contends it did not sustain actual injury until March 2006, when it settled the InterHealth action. It argues that it did not incur any additional attorney fees in the InterHealth action that were due to Sedgwick's alleged negligence and breach of fiduciary duty because it was brought into the action by the other insurers and filed its own cross-complaint for reformation/rescission against GMF before GMF filed its cross-complaint alleging breach of contract and bad faith. Therefore, NORCAL argues it did not sustain actual injury due to Sedgwick's conduct until NORCAL had to pay to settle GMF's claims. We disagree.

Even if we accept NORCAL's contention that it did not incur any additional attorney fees due to GMF's breach of contract and bad faith claims,[7] incurring

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[7] We note that the facts upon which this contention is based are not alleged in the complaint. (See fn. 5, *ante*.)

attorney fees due to a prior attorney's negligence is not the only injury that can give rise to a claim for legal malpractice. For example, in *Sindell v. Gibson, Dunn & Crutcher* (1997) 54 Cal.App.4th 1457, the court concluded that a client suffers injury upon the filing of a lawsuit that the attorney's retention was meant to avoid. (*Id.* at p. 1470.) In that case, the plaintiffs' father hired an attorney to prepare and document his estate plan. The attorney failed to obtain a written consent from the father's wife (which she would have given) for certain property transfers. Three years later, after the wife fell ill and became mentally incompetent to give her consent, the wife's adult children filed a family law action to set aside the property transfers. Within a year after becoming aware of the family law action, and while that family law action was still pending, father and his children filed a legal malpractice action against the attorney and her law firm. The trial court sustained the law firm's demurrer to the malpractice complaint, finding the lawsuit was premature because the plaintiffs could not allege any injury until the family law action was concluded. (*Id.* at pp. 1460-1462.) The appellate court reversed, explaining that "[w]here, as here, the purpose of a lawyer's retention is to place the client and his or her intended beneficiaries in a posture of quiet ownership of assets, and the lawyer negligently fails to obtain a simple written consent which would all but preclude costly litigation, *the mere fact of such litigation is the unwanted consequence*. The litigation represents the loss of the bargained-for benefit; the litigation itself is the event which constitutes damage." (*Id.* at p. 1470.)

So it is in the present case. NORCAL retained Sedgwick to give it advice regarding whether NORCAL had a duty to defend or indemnify GMF with respect to the GMC/GMF action -- advice which, if properly given, would all but preclude liability for bad faith breach of contract. While it may be true that NORCAL could not have avoided litigation regardless of the advice given, since it contends it was

brought into the InterHealth action by the other insurers and had to institute its own reformation/rescission action against GMF, Sedgwick's alleged negligence allowed GMF to raise a viable bad faith claim it otherwise would not have been able to raise and exposed NORCAL to increased liability. Thus, NORCAL suffered injury when GMF asserted its bad faith claim in June 2004.

The fact that NORCAL could not at that point determine the exact extent of its injury did not toll the statute of limitations until the underlying litigation was resolved. The Supreme Court has made clear that "once the plaintiff suffers actual harm, neither difficulty in proving damages nor uncertainty as to their amount tolls the limitations period." (*Jordache, supra*, 18 Cal.4th at p. 752.) Thus, NORCAL was required to file its malpractice lawsuit (or obtain a tolling agreement) within one year after GMF filed its bad faith claim.

NORCAL argues, however, that it could not be required to file a malpractice claim against its former attorneys during the pendency of related litigation because that would jeopardize the interest it had retained the attorneys to protect. The Supreme Court rejected a similar argument in *Jordache*. The Court explained that "section 340.6 reflects the balance the Legislature struck between a plaintiff's interest in pursuing a meritorious claim and the public policy interests in prompt assertion of known claims. The courts may not shift that balance by devising expedients that extend or toll the limitations period. The Legislature expressly disallowed tolling under any circumstances not stated in the statute." (*Jordache, supra*, 18 Cal.4th at p. 756.) The Court noted that "existing law provides the means for courts to deal with potential problems that may arise from the filing of a legal malpractice action when related litigation is pending. [Citation.] The case management tools available to trial courts, including the inherent authority to stay an action when appropriate and the ability to issue protective orders when necessary, can overcome problems of simultaneous litigation if they do occur."

(*Id*. at p. 758.) NORCAL fails to explain why those case management tools, or other devices such as a tolling agreement, would not have been sufficient to protect its interests in this case.

In short, we find the trial court correctly concluded that NORCAL sustained actual injury within the meaning of section 340.6 no later than June 2004, when GMF sued it for bad faith breach of contract.

D. *Continuing Representation*

The determination of the date of actual injury does not necessarily determine when the limitations period of section 340.6 begins to run, because the statute also is tolled while "[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." (§ 340.6, subd. (a)(2).) We conclude that Sedgwick's representation of NORCAL within the meaning of the continuing representation provision did not continue beyond May 2005, when Sedgwick wrote to NORCAL on behalf of the reinsurers to deny coverage to NORCAL, and that Sedgwick is not estopped from relying on this ground.

In its points and authorities in support of its demurrer (and in its respondent's brief on appeal), Sedgwick contended the limitations period was not tolled under continuing representation provision, because the complaint alleges that Sedgwick's representation was limited to providing advice regarding whether NORCAL had a duty to defend or indemnify GMF in the GMC/GMF action, which took place in 2002 to 2003. In any event, Sedgwick argued that NORCAL could not have believed that Sedgwick continued to represent it after May 31, 2005, when Sedgwick sent NORCAL a letter on behalf of the reinsurers denying NORCAL's claim for coverage related to GMF's bad faith and breach of contract claims.

NORCAL did not address the continuing representation provision in opposition to the demurrer. On appeal, however, it argues that the allegations of the complaint do not limit Sedgwick's representation to simply providing advice regarding NORCAL's duty to defend or indemnify, because the complaint alleges that Sedgwick "assumed responsibility for advising NORCAL and the reinsurers with respect to the [GMF] claim" and that Sedgwick "continued to represent the reinsurers in addition to representing NORCAL with respect to the [GMF] claim." We disagree.

The allegations NORCAL cites, when read in context, do not establish an attorney-client relationship that continued past May 31, 2005 for the purposes of section 340.6. As a preliminary matter, we note that those allegations appear immediately before and after the specific allegation that Sedgwick was retained to provide a legal opinion regarding "whether NORCAL should acknowledge a duty to defend and/or a duty to indemnify [GMF] . . . for the [GMC/GMF action]." That opinion was provided in December 2002 through February 2003, and the GMC/GMF action ended by settlement in July 2003, more than three years before the instant lawsuit was deemed filed. There are no allegations that Sedgwick provided any legal advice or services to NORCAL after 2003.

But even if NORCAL's vague allegation that Sedgwick "continued to represent the reinsurers in addition to representing NORCAL with respect to the [GMF] claim" could be read to mean that Sedgwick continued to represent NORCAL for some time after the settlement of the GMC/GMF action, NORCAL's allegation that Sedgwick acted adversely to it by representing the reinsurers in denying NORCAL's reinsurance claim on May 31, 2005 establishes that as of that date, there no longer was an attorney-client relationship sufficient to toll the limitations period of section 340.6. The purpose of the "continuous representation" tolling rule in section 340.6 is "to 'avoid the disruption of an

attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired.'" (*Laird v. Blacker*, *supra*, 2 Cal.4th at p. 618.) As we noted in *Shapero v. Fliegel* (1987) 191 Cal.App.3d 842, the rule is substantially similar to the rule created by the New York courts, and was explained as follows: "'In those cases where the continuous representation doctrine has been applied to attorney malpractice there are clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney often involving an attempt by the attorney to rectify an alleged act of malpractice [citations].' Further, 'application of the continuous representation doctrine in attorney malpractice envisions a relationship between the parties that is marked with trust and confidence. It is a relationship which is not sporadic but developing and involves a continuity of the professional services from which the alleged malpractice stems.'" (*Id.* at p. 848.) Thus, "'[c]ontinuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship.'" (*Fritz v. Ehrmann* (2006) 136 Cal.App.4th 1374, 1389.)

In this case, the allegation that Sedgwick acted adversely to NORCAL by representing the reinsurers in denying NORCAL's reinsurance claim makes clear that as of May 31, 2005, NORCAL and Sedgwick no longer had an "ongoing *mutual* relationship" (*Fritz v. Ehrmann*, *supra*, 136 Cal.App.4th at p. 1389) that was "'marked with trust and confidence'" (*Shapero v. Fliegel*, *supra*, 191 Cal.App.3d at p. 848). NORCAL argues, however, that Sedgwick is estopped to assert that its representation of NORCAL did not continue, because Sedgwick represented adverse parties without obtaining a waiver from NORCAL of the conflict of interest. NORCAL is incorrect.

In making this argument, NORCAL relies upon attorney disqualification cases that hold that, where an attorney concurrently represents two clients with conflicting interests, the attorney cannot avoid automatic disqualification and continue to represent one client by converting the other client to a former client. (*State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422; *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050.) Those cases have no application here. The purpose of the disqualification rule in concurrent representation cases is to enforce the duty of loyalty an attorney owes to a client and protect "'public confidence in the legal profession and the judicial process.'" (*Truck Ins. Exchange v. Fireman's Fund Ins. Co.*, *supra*, 6 Cal.App.4th at p. 1057; see also *State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.*, *supra*, 72 Cal.App.4th at p. 1428, 1431.) The rule does not operate to continue the attorney's representation of the forsaken client; it simply enforces the attorney's ethical obligations by precluding the attorney from representing the favored client adversely to the forsaken client. That rule is not relevant to this case.

The other case NORCAL relies upon, *Johnson v. Haberman & Kassoy* (1988) 201 Cal.App.3d 1468 (*Johnson*), also is inapplicable to the present case. In *Johnson*, the plaintiff, a limited partner in a partnership, hired the defendant attorneys to investigate possible fraud and misappropriation by the general partners and to protect his interest in the partnership. (*Id.* at p. 1471.) A month later, without the plaintiff's knowledge or consent, the attorneys undertook to represent the general partners. Later, upon the attorneys' recommendation, the plaintiff sold out his interest at about 10 percent of his investment. (*Ibid.*) Six years later, the plaintiff learned for the first time that the attorneys who recommended that he accept the general partners' buyout offer had also been representing the general partners. (*Id.* at p. 1472.) The plaintiff filed a malpractice action against the

attorneys six months after that discovery. (*Ibid.*) The trial court granted summary judgment in favor of the attorneys on the ground that the action was barred by section 340.6. (*Id.* at p. 1473.)

The court of appeal reversed, holding that the statute of limitation was tolled until the plaintiff discovered or should have discovered his cause of action for malpractice. (*Johnson*, *supra*, 201 Cal.App.3d at p. 1478.) Before reaching that holding, however, the appellate court addressed the plaintiff's contention that the attorney-client relationship was never terminated or repudiated, and therefore the limitations period was tolled under the continuous representation rule of section 340.6. (*Id.* at p. 1474.) The court recognized that the issue of continuous representation was not resolved by determining whether there was a proper, formal withdrawal of counsel. (*Id.* at pp. 1474-1475.) But the court noted that the plaintiff had also alleged that the attorneys had placed themselves in a conflict of interest situation, which precluded them from acting in the plaintiff's best interest due to their simultaneous representation of the general partners. (*Id.* at p. 1475.) The court concluded that, "[u]nder these particular circumstances, where attorneys violate the rules governing representation of adverse parties by undertaking to represent the very parties they were supposed to investigate without obtaining any waiver from their original client and without any formal termination of the relationship, they should be estopped from claiming that their representation of the original client did not continue." (*Ibid.*)

The circumstances of the present case bear little resemblance to the circumstances in *Johnson*. The attorneys' conflict of interest in *Johnson* not only precluded them from doing the work they were retained to do -- investigate the general partners and file a lawsuit against them if there was evidence they engaged in fraud -- it was a conflict they never disclosed to the plaintiff, preventing him from discovering the malpractice. (*Johnson*, *supra*, 201 Cal.App.3d at p. 1475.)

Within six months after discovering the attorneys' conflict and malpractice, the plaintiff filed his lawsuit. (*Id.* at p. 1472.) In contrast, in this case NORCAL was aware that Sedgwick represented both NORCAL and the reinsurers when NORCAL retained Sedgwick to provide coverage advice. To the extent there was a conflict of interest due to the omission of the known claims exclusion in NORCAL's policy issued to GMF, Sedgwick's representation of the reinsurers did not preclude it from giving proper advice to NORCAL, since doing so would not violate Sedgwick's duty of loyalty to the reinsurers. Moreover, even if NORCAL was not aware of Sedgwick's alleged conflict until the reinsurers denied NORCAL's claim for reinsurance coverage in May 2005, it was fully aware of Sedgwick's alleged malpractice no later than June 2004, when GMF filed its bad faith breach of contract claim, yet NORCAL did not file its malpractice action for more than two years after it discovered the alleged malpractice and more than a year after discovering the conflict of interest. In light of these circumstances, there is no basis to estop Sedgwick from asserting that its representation of NORCAL did not continue beyond May 2005.[8]

E. *Claim Based Upon 1999/2000 Policy*

NORCAL argues that even if its claim of malpractice related to the 2000/2001 policy is time-barred, it has alleged a separate claim related to the 1999/2000 policy that is not barred. It contends it alleged that Sedgwick was negligent in failing to determine and advise NORCAL that there was a possibility of coverage under the 1999/2000 policy, and that Sedgwick acted against NORCAL's interest by

[8] We note that Sedgwick criticizes the *Johnson* court's statement that the attorneys should be estopped to assert that their representation of the plaintiff did not continue, arguing that the statement is dictum, is not logically sound, and ignores case law that cautions against devising new tolling mechanisms. In light of our conclusion that *Johnson* does not apply to this case, we need not address Sedgwick's criticisms.

representing the reinsurers in denying NORCAL's claim under that policy. Since GMF did not assert a claim under the 1999/2000 policy until December 2005, and the reinsurers did not respond to NORCAL's tender until October 2006, NORCAL asserts it did not suffer injury arising from Sedgwick's negligence or breach of duty until December 9, 2005 at the earliest.

We are not convinced. To the extent NORCAL's claims are based upon Sedgwick's allegedly negligent coverage advice, GMF's claim based upon the 1999/2000 policy does not give rise to separate claims for malpractice. The essence of NORCAL's malpractice claim is that Sedgwick's negligent coverage advice caused NORCAL to be exposed to a bad faith claim and increased liability. The fact that Sedgwick overlooked several issues when it advised NORCAL to deny GMF's claim as untimely -- such as evidence that GMF had timely tendered the claim, that NORCAL had a possible coverage defense based upon the binding of the 2000/2001 policy subject to a known claim exclusion if NORCAL were able to perfect that defense, and that there might be coverage under the 1999/2000 policy -- does not give rise to a different malpractice claim for each overlooked issue. "'The long-standing rule in California is that a single tort can be the foundation for but one claim for damages. [Citation.] Accordingly, if the statute of limitations bars an action based upon harm immediately caused by defendant's wrongdoing, a separate cause of action based on a subsequent harm arising from that wrongdoing would normally amount to splitting a cause of action.'" (*Bennett v. Shahhal* (1999) 75 Cal.App.4th 384, 391-392.) The wrongdoing in this case was Sedgwick's allegedly negligent coverage advice, which initially caused injury when GMF filed its bad faith claim against NORCAL in June 2004. Even if GMF's subsequent assertion of an additional reason why NORCAL's denial of coverage or a defense was improper caused NORCAL additional harm, the additional harm flowed from

the same purportedly negligent advice. Therefore, it does not give rise to a separate claim for malpractice.

Similarly, Sedgwick's representation of the reinsurers in denying NORCAL's claim for coverage for GMF's claim under the 1999/2000 policy does not give rise to a separate claim for malpractice or breach of fiduciary duty. NORCAL argues that the reinsurers for the 1999/2000 policy were not the exact same reinsurers for the 2000/2001 policy, and therefore Sedgwick's representation of the reinsurers in denying NORCAL's claims under each policy constituted two separate breaches. But the fact that the reinsurers of each policy were not entirely coextensive is not dispositive. Sedgwick allegedly caused NORCAL injury when it represented Lloyd's with respect to the denial of NORCAL's claim under 2000/2001 policy. The alleged wrongdoing was Sedgwick's representation of interests adverse to NORCAL without obtaining NORCAL's waiver of the conflict. Sedgwick's continued representation of Lloyd's, as well as two other reinsurers, with respect to the denial of NORCAL's claim under the 1999/2000 policy was simply a continuation of the same alleged wrongdoing, not a separate tort. (*Bennett v. Shahhal*, *supra*, 75 Cal.App.4th at pp. 391-392.)

F. *Breach of Fiduciary Duty*

NORCAL argues that even if its claim for legal malpractice is barred by section 340.6, its claim for breach of fiduciary duty is governed by the catchall four-year statute of limitation set forth in section 343. NORCAL's sole support for this argument is the case of *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884 (*David Welch*). In that case, the plaintiff was a collection agency that had developed a specialty in a particular type of collections activity. For many years, the defendants represented the plaintiff in its collections work, during which representation the plaintiff specially trained the defendants and entrusted the

defendants with complete access to its confidential business techniques. After the parties terminated their relationship, the attorneys began to acquire the collection business the plaintiff used to perform for its clients. The plaintiff sued the defendants for breach of fiduciary duty, and the trial court found in favor of the plaintiff. (*Id.* at p. 888.) On appeal, the defendants argued, among other things, that section 340.6 applied and barred the plaintiff's claim. Without any analysis, the appellate court simply stated: "But where a cause of action is based on a defendant's breach of its fiduciary duties, the four-year catchall statute set forth in Code of Civil Procedure section 343 applies." (*Id.* at p. 893.)

As NORCAL notes, several subsequent courts have declined to follow *David Welch* when the breach of fiduciary duty claim is asserted in the context of legal malpractice. (See, e.g., *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1369; *Pompilio v. Kosmo, Cho & Brown* (1995) 39 Cal.App.4th 1324, 1329.) We do the same here. Section 340.6 by its express language applies to any "action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services." (§ 340.6, subd. (a).) NORCAL's claim for breach of fiduciary duty does not allege actual fraud and is based upon Sedgwick's alleged wrongful conduct in the performance of professional services. Therefore, it is governed by the one-year statute of limitation set forth in section 340.6.

F. *Denial of Leave to Amend*

NORCAL argues the trial court erred by denying it leave to amend its complaint. "When a demurrer is sustained without leave to amend, '"we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." [Citations.]'

[Citation.] [¶] . . . [¶] To show abuse of discretion, plaintiff must show in what manner the complaint could be amended and how the amendment would change the legal effect of the complaint, i.e., state a cause of action. [Citations.] This showing may be made either in the trial court or on appeal. [Citation.]" (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 992.)

Although NORCAL included a footnote in its opposition to the demurrer asking for an opportunity to amend its complaint to "clarify" any "disputed facts" regarding the tolling of the limitations period if the trial court were to sustain the demurrer, it did not offer any indication of what facts it wished to clarify. On appeal, NORCAL offers five "clarifying allegations" that it contends would "overcome Sedgwick's arguments": (1) NORCAL did not incur any defense costs as a result of GMF's bad faith claim; (2) the reinsurers did not finally deny coverage under the 2000/2001 policy until March 8, 2006; (3) Sedgwick and NORCAL had a continuing relationship at least through May 2006; (4) Sedgwick did not give NORCAL notice of its withdrawal from its attorney-client relationship with NORCAL; and (5) Sedgwick was negligent in failing to advise NORCAL that there might be coverage under the 1999/2000 policy, and NORCAL was not injured by this negligence until GMF made a claim under that policy. None of NORCAL's proposed amendments would change the legal effect of the complaint.

NORCAL offers the first proposed amendment to show that it did not sustain injury until it settled the InterHealth action for more than it would have in the absence of Sedgwick's negligence. But as discussed in section C., *ante*, NORCAL sustained actual injury resulting from Sedgwick's alleged negligence when GMF filed its bad faith claim, a claim that would not have been viable in the absence of Sedgwick's alleged negligence. Therefore the proposed amendment would not affect the date of actual injury for the purpose of section 340.6.

The second proposed amendment seeks to "clarify that NORCAL was not told until March 8, 2006 that the 2000/2001 Reinsurers would not participate in or contribute toward a settlement." This "clarification" has no relevance to the application of section 340.6. It does not affect the date of actual injury, nor does it change the fact that NORCAL was on notice that Sedgwick was representing the reinsurers adversely to it by May 2005, thus establishing that the attorney-client relationship between NORCAL and Sedgwick was not continuing.

NORCAL's third and fourth proposed amendments also attempt to address the continuing representation tolling rule. With regard to its third proposed amendment, NORCAL asserts that its clarification that the settlement in the InterHealth action was not finalized until May 2006 will establish that Sedgwick and NORCAL had a continuing relationship at least through May 2006. NORCAL does not explain how the continuation of the InterHealth action has any bearing on whether Sedgwick continued to represent NORCAL for the purposes of section 340.6. With regard to NORCAL's proposed amendment to allege that Sedgwick did not formally withdraw from the attorney-client relationship and did not obtain a waiver of its conflict of interest, as we discussed in section D., *ante*, the absence of a formal withdrawal or waiver of the conflict does not affect our conclusion that Sedgwick's representation had ceased no later than May 2005.

By its fifth proposed amendment, NORCAL seeks to make clear that its malpractice and breach of fiduciary duty claims also relate to Sedgwick's conduct regarding the 1999/2000 policy. As we discussed in section E., *ante*, NORCAL cannot avoid the statute of limitation by splitting its causes of action. (*Bennett v. Shahhal*, *supra*, 75 Cal.App.4th at pp. 391-392.)

In short, NORCAL has not met its burden to show that the proposed amendments will cure the defects of the complaint and establish that its claims are not time-barred. (*Buller v. Sutter Health*, *supra*, 160 Cal.App.4th at p. 992.) Thus,

we hold the trial court did not abuse its discretion by denying NORCAL leave to amend the complaint.

## DISPOSITION

The judgment is affirmed. Sedgwick shall recover its costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

WILLHITE, Acting P. J.

We concur:

MANELLA, J. SUZUKAWA, J.